

## AN OVERVIEW OF PRESIDENT TRUMP'S SEPTEMBER 24<sup>TH</sup> TRAVEL BAN

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On September 24, 2017, President Donald Trump signed a presidential proclamation<sup>1</sup> placing travel restrictions on eight countries.<sup>2</sup> This proclamation was enacted to replace several expiring provisions in previous restrictive executive orders.<sup>3</sup> This is President Trump's third travel restriction and is aimed at collecting information on individuals seeking to enter the United States, rather than banning individuals from certain Muslim-majority countries.<sup>4</sup>

### **Earlier Travel Restrictions**

President Trump issued his first travel restriction, Executive Order 13769, in January 2017.<sup>5</sup> That executive order quickly became known as a "Muslim Ban" and was heavily protested.<sup>6</sup> The January executive order suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, placed an indefinite ban on entry by Syrian refugees, and placed a ninety-day visa suspension on anyone arriving from the seven countries referred to in section 217(a)(12) of the Immigration and Nationality Act.<sup>7</sup> The countries affected, Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, are all

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<sup>1</sup> An executive order is a legally binding order directing agencies within the executive branch, whereas a presidential proclamation is directed toward individuals outside of the executive branch. See JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-722 A, EXECUTIVE ORDERS AND PROCLAMATIONS 1 (1999), <http://www.llsdc.org/assets/sourcebook/crs-exec-orders-procs.pdf>.

<sup>2</sup> Proclamation No. 9645, 82 Fed. Reg. 45161, 45171 (Sept. 24, 2017), [hereinafter Presidential Proclamation].

<sup>3</sup> See Exec. Order No. 13780, 82 Fed. Reg. 13209, 13213 (Mar. 6, 2017) [hereinafter March Order] (containing provisions which expired within 60, 90, 120, and 150 days); Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978-80 (Jan. 27, 2017) [hereinafter January Order] (containing provisions which expired within 60, 90, 100, 120, and 200 days after the order).

<sup>4</sup> Compare Presidential Proclamation at 45161, with January Order, and March Order.

<sup>5</sup> January Order at 8977.

<sup>6</sup> Doug Criss, *Trump Travel Ban: Here's What You Need to Know*, CNN POLITICS (Jan. 30, 2017, 9:10 AM), <http://www.cnn.com/2017/01/30/politics/trump-travel-ban-q-and-a/index.html>; *Trump's Executive Order: Who Does Travel Ban Affect?*, BBC NEWS (Feb. 10, 2017), <http://www.bbc.com/news/world-us-canada-38781302>.

<sup>7</sup> 8 U.S.C. 1187(a)(12) (2015); January Order at 8977-79.

majority Muslim countries.<sup>8</sup> One of the most controversial components of the order was that priority was to be given to religious minorities who were facing persecution in their countries of origin.<sup>9</sup> Executive Order 13769 was revoked March 6, 2017.<sup>10</sup>

In Executive Order 13780, signed March 6, 2017, the Trump Administration again banned entry by nationals of countries deemed to pose a threat to national security.<sup>11</sup> The Order restricted travel from Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>12</sup> President Trump also ordered the Secretary of Homeland Security to submit a report on what information would be needed to assess whether nationals of foreign countries seeking to enter the United States pose a security threat.<sup>13</sup> The Secretary of Homeland Security determined that some countries “remain[ed] deficient . . . with respect to their identity-management and information-sharing capabilities, protocols, and practices.”<sup>14</sup> The Supreme Court was scheduled to hear arguments on the legality of the ban on October 10, 2017, but removed the case from its schedule after the President issued the September 24th Proclamation.<sup>15</sup>

### September Travel Restriction

Motivated by the same policy of improving screening and vetting procedures of foreign nationals seeking to enter the United States, President Trump signed the September 24, 2017 proclamation. The newest proclamation adds Chad, North Korea, and Venezuela to and removes Sudan from the list of affected countries that did not meet identity-management and information-sharing standards or were not willing to cooperate.<sup>16</sup> This order

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<sup>8</sup> U.S. DEP'T OF HOMELAND SECURITY, FACT SHEET: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY TO THE UNITED STATES, Jan. 29, 2017, <https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states>; *Muslim-Majority Countries Comprising the Islamic World*, UNIVERSITY OF MICHIGAN CENTER FOR THE EDUCATION OF WOMEN (2016), [http://www.cew.umich.edu/muslim\\_majority](http://www.cew.umich.edu/muslim_majority).

<sup>9</sup> January Order at 8979.

<sup>10</sup> March Order at 13218.

<sup>11</sup> *Id.* at 13210-11, 13219.

<sup>12</sup> *Id.* at 13210-11.

<sup>13</sup> *Id.* at 13212-13. The review resulted in a report in which the Secretary of Homeland Security determined what type of information from foreign governments would aid the ability of the United States Government to confirm foreign a national's identity and assess any potential threat to the United States. *See* Presidential Proclamation at 46161.

<sup>14</sup> Presidential Proclamation at 46161.

<sup>15</sup> Andrew Chung & Mica Rosenberg, *Trump Travel Ban on More Solid Ground as Top Court Cancels Hearing*, REUTERS, (Sept. 25, 2017, 7:34 AM), <http://www.reuters.com/article/us-usa-immigration-trump-legal/trump-travel-ban-on-more-solid-ground-as-top-court-cancels-hearing-idUSKCN1C01O5?il=0>.

<sup>16</sup> *Compare* Presidential Proclamation at 45164-65 *with* March Order at 13210-11.

was entered in line with the Administration's commitment to "engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks."<sup>17</sup>

Pursuant to the report required by the March executive order, the Department of Homeland Security assessed each country's willingness and ability to provide information to the United States Government.<sup>18</sup> The Department identified forty-seven countries as "inadequate" or at risk of becoming "inadequate" after analyzing the countries' "identity-management protocols, information-sharing practices, and risk factors."<sup>19</sup> Seven countries remain "inadequate" including Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.<sup>20</sup> The President noted that Somalia meets the baseline information-sharing requirements, but President Trump placed entry restrictions on the country due to "its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory."<sup>21</sup> In regard to the "inadequate" countries, the restrictions placed on each vary, and appear to be tailored to the country's level of cooperation.<sup>22</sup> However, for all but one of the seven "inadequate" countries, nationals are suspended from entry to the United States as immigrants.<sup>23</sup> The most restrictive suspensions were placed on North Korea and Syria, where entry of all nationals as immigrants or nonimmigrants was suspended.<sup>24</sup> The proclamation does permit case-by-case waiver for citizens of the restricted countries who meet certain criteria.<sup>25</sup> The new restrictions and limitations will become effective on October 18, 2017.<sup>26</sup>

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<sup>17</sup> Presidential Proclamation at 45161.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 45163.

<sup>20</sup> *Id.* Iraq did not meet the national security baseline and no entry restrictions or limitations are warranted under the proclamation due to the Iraqi government's cooperation. However, the Secretary of Homeland Security recommends nationals of Iraq be subjected to additional scrutiny. *Id.*; EXECUTIVE OFFICE OF THE PRESIDENT, FACT SHEET: PROCLAMATION ON ENHANCING VETTING CAPABILITIES AND PROCESSES FOR DETECTING ATTEMPTED ENTRY INTO THE UNITED STATES BY TERRORISTS OR OTHER PUBLIC-SAFETY THREATS (Sept. 24, 2017), 2017 WL 4231203, at \*4.

<sup>21</sup> Presidential Proclamation at 45165.

<sup>22</sup> *See generally id.*

<sup>23</sup> *Id.* at 45164. The restriction on Venezuelan nationals is "focused on government officials of Venezuela" only. *Id.* at 45166.

<sup>24</sup> *Id.* at 45166.

<sup>25</sup> *Id.* at 45165.

<sup>26</sup> *Id.* at 45171.

### **What kind of information is gathered?**

The Secretaries of State and Homeland Security and the Director of National Intelligence established three categories of criteria under which the President claims individuals should be assessed: identity-management information, national security and public-safety information, and national security and public-safety risk assessment.<sup>27</sup> These criteria are considered to be the national security baseline for information that will assist the United States government.<sup>28</sup> Identity-management information includes “whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.”<sup>29</sup> This information allows the United States government to assess the legitimacy of required travel documents. National security and public-safety information includes “whether the country makes available . . . known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government’s receipt of information about passengers and crew traveling to the United States.”<sup>30</sup> National security and public-safety risk assessment includes “whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program . . . , and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.”<sup>31</sup>

### **Is the Ban constitutional?**

We can expect to hear statements on both sides regarding the constitutionality of the Proclamation. Those in support are likely to argue the President has a duty to protect citizens of the United States, while those in opposition may argue this is a “Muslim ban,” prohibited by the Establishment Clause. Due to the addition of some non-Muslim-majority countries and the tailored restrictions for each individual country, the Trump Administration seems to have a stronger constitutional position than with the previous executive orders restricting travel.

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<sup>27</sup> Presidential Proclamation at 45162.

<sup>28</sup> *Id.* at 45162–63.

<sup>29</sup> *Id.* at 45162.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 45162-63.